



IT IS ORDERED as set forth below:

Date: February 29, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
AUDIE ELMO INGRAM	:	BANKRUPTCY CASE
DEBORAH LYNN INGRAM,	:	NO. 06-11313-WHD
	:	
Debtors.	:	
_____	:	
	:	
GEORGIA LOTTERY	:	
CORPORATION,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 07-1013
v.	:	
	:	
AUDIE ELMO INGRAM	:	
DEBORAH LYNN INGRAM,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendants.	:	BANKRUPTCY CODE

ORDER

This matter comes before the Court on the “Motion for Summary Judgment”

(hereinafter the "Motion") filed by Georgia Lottery Corporation (hereinafter the "Plaintiff"). The Motion arises in connection with an adversary proceeding initiated by the Plaintiff to determine the dischargeability of a debt owed by Audie and Deborah Ingram (hereinafter the "Defendants"). The Defendants oppose the Motion. On October 19, 2007, the Court issued an order requesting supplemental briefs on a discrete issue. Both parties have now filed supplemental briefs. This matter is a core proceeding, *see* 28 U.S.C. § 157(b)(2)(I), and will be disposed of in accordance with the following reasoning.

FINDINGS OF FACT

1. From 1998 until 2005, Mr. Ingram operated a convenience store referred to as Cadie's Corner. Deposition of Audie Elmo Ingram, June 25, 2007 (hereinafter "Audie Ingram Deposition") at 11. Mr. Ingram purchased the assets of Cadie's Corner, Inc. Affidavit of Audie Elmo Ingram (hereinafter "Audie Ingram Affidavit").
2. On or about March 17, 1998, Mr. Ingram signed a Georgia Lottery Retailer Application (hereinafter the "Application"). The entity listed as the applicant is The New Cadie's Corner, Inc. (hereinafter "TNCC"). In the space captioned "If incorporated, date of Incorporation," is written "3-1-1998." Mr. Ingram is listed as the contact name, and his position is listed as "owner." TNCC is listed as a corporation. Mr. Ingram is listed as the sole owner of the "Business." By signing this portion of the Application, Mr. Ingram certified that the information contained in that portion was true and correct in every respect.

In Part 3 of the Application ("Lottery Retailer Electronic Funds Authorization"), the Retailer Name is listed as "Audie Ingram D/B/A Cadie's Corner."

3. On or about March 17, 1998, Mr. Ingram executed a Georgia Lottery Retailer Contract (hereinafter the "Contract"). Audie Ingram Affidavit. Mr. Ingram signed the Contract "as Agent for [a] Corporation." Defendant Audie Elmo Ingram's Response to Plaintiff's First Requests for Admissions to Defendants Audie Elmo Ingram and Deborah Lynn Ingram (hereinafter "Response to Admissions"), ¶ 1.

4. In the Contract, the name of the "retailer" is listed as Cadie's Corner, and the type of entity is listed as "corporation." Next to Mr. Ingram's printed name is written "owner."

5. On March 24, 1998, Mr. Ingram formed the corporation of The New Cadie's Corner, Inc. (hereinafter "TNCC").¹ Mr. Ingram was the president and sole shareholder of TNCC. Plaintiff's Statement of Uncontested Facts, ¶ 2. Mrs. Ingram was the secretary of TNCC. Deposition of Deborah Lynn Ingram, June 25, 2007 (hereinafter "Deborah Ingram Deposition"), at 10.

6. Following the incorporation of TNCC, TNCC operated the store known as Cadie's Corner. Defendant's Statement of Undisputed Facts, ¶ 1. Officers and/or employees of

¹ Mr. Ingram has attached to his affidavit a computer print-out of records maintained by the Georgia Secretary of State's Office that indicate that TNCC was incorporated on March 24, 1998. Mr. Ingram also states in his affidavit that he believes the Secretary of States records are "true and correct." As there is no other evidence in the record that would contradict this statement as it pertains to the date of incorporation, the Court finds that TNCC was not incorporated until March 24, 1998.

TNCC activated and sold lottery tickets under the Contract. Plaintiff's Statement of Uncontested Facts, ¶ 2; Response to Admissions, ¶ 3.

7. The Plaintiff terminated the Contract on January 20, 2006 due to TNCC's failure to maintain sufficient funds in a segregated account to pay its obligations to the Plaintiff. Plaintiff's Statement of Uncontested Facts, ¶ 9. During the accounting weeks ending December 31, 2005, January 7, 2006, and January 14, 2006, Georgia lottery tickets were activated, settled, and sold at Cadie's Corner. Plaintiff's Statement of Uncontested Facts, ¶ 14; Defendants' Statement of Uncontested Facts, ¶ 14. Mr. Ingram failed to deposit funds into the segregated account or to remit funds to the Plaintiff to account for the tickets activated, settled, and sold during those accounting weeks. *Id.* at ¶¶ 14; 24; Defendants' Statement of Uncontested Facts, ¶¶ 14; 24; Deposition of Audie Elmo Ingram, June 25, 2007 (hereinafter "Audie Ingram Deposition), at 60.

CONCLUSIONS OF LAW

A. Summary Judgment

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of a

proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. Standards of Section 523(a)(4)

Section 523(a)(4) provides in pertinent part, a "discharge under section 727 . . . of this title does not discharge an individual from any debt . . . for fraud or defalcation while

acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Thus, to establish nondischargeability pursuant to section 523(a)(4), the Court must find that (1) the Defendants acted as a fiduciary; and (2) that the debt at issue arose from the Defendants' commission of an act of fraud or defalcation during the performance of their fiduciary duties. Implicit in this is the requirement that the Plaintiff must establish that the Defendants are also personally liable for the debt at issue. *See Grogan v. Garner*, 498 U.S. 279 (1991); *see also In re Petersen*, 296 B.R. 766, 775 (Bankr. C.D. Ill. 2003).

As noted in its earlier order, in their related bankruptcy case, the Defendants listed on their Schedule E a joint debt owed to the Plaintiff in the amount of \$22,549.65. The Court has previously concluded that the listing of this debt without marking the debt as contingent, unliquidated, or disputed "constitutes a judicial admission that [the Defendants do] in fact owe a debt to" the Plaintiff. *Matter of Musgrove*, 187 B.R. 808, 812 (Bankr. N.D. Ga. 1995) (Drake, J.). Accordingly, the Court held that, by failing to "qualify the debt as disputed," the Defendants "waived the right to contest the debt's existence." *Id.* at 812-13. This judicial admission establishes that the Defendants are personally liable for the debt owed to the Plaintiff.

In order to grant summary judgment to the Plaintiff, however, the Court must also determine that the debt is nondischargeable under section 523(a)(4). Section 523(a)(4) of the Bankruptcy Code provides that “a discharge . . . does not discharge an individual Debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C.

§ 523(a)(4). For a debt to fall within this exception to discharge, the debtor must have acted as a fiduciary within the meaning of section 523(a)(4). Not all fiduciary duties will satisfy this requirement. “The Supreme Court has consistently held that the term ‘fiduciary’ is not to be construed expansively, but instead is intended to refer to ‘technical’ trusts.” *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir.1993) (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934)); *see also In re Fernandez-Rocha*, No. 06-10159, ___ F.3d ___ (11th Cir. June 12, 2006). Courts have recognized three characteristics of a technical trust. *See Eavenson v. Ramey*, 243 B.R. 160 (N.D. Ga. 1999). First, a technical trust “must exist prior to the act creating the debt and without reference to that act.” *Id.* at 165; *see also Blashke v. Standard (In re Standard)*, 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991) (Bihary, J.). Second, the fiduciary duties associated with the trust must be specifically set forth so that the trust relationship is expressly and clearly stated. *See id.* Third, the trust must have a “separately identifiable res.” *Id.*; *see also Matter of Snyder*, 184 B.R. 473 (D. Md. 1995) (citing *In re Baird*, 114 B.R. 198, 202 (9th Cir. BAP 1990)).

Such a trust can be created by statute. In this case, the Georgia Lottery for Education Act² (hereinafter the "Act") creates a statutory trust in favor of the Plaintiff over the

² O.C.G.A. § 50-27-21(a) provides:

All proceeds from the sale of the lottery tickets or shares shall constitute a trust fund until paid to the corporation either directly or through the corporation's authorized collection representative. A lottery retailer and officers of a lottery retailer's business shall have a fiduciary duty to preserve and account for lottery proceeds and lottery retailers shall be personally liable for all proceeds.

proceeds from the sale of lottery tickets. *See In re Suwannee Swifty Stores, Inc.*, 266 B.R. 544 (Bankr. M.D. Ga. 2001). This statutory trust is an express trust and therefore imposes a fiduciary duty upon the retailer and its officers within the meaning of section 523(a)(4). *See In re Daniel*, 225 B.R. 249 (Bankr. N.D. Ga. 1998 (Murphy, J.); *In re Finely*, Case No. 07-75294-ADK (Bankr. N.D. Ga. 1997) (Kahn, J.); *In re Sadler*, 2007 WL 625915 (Bankr. M.D. Ala. Feb. 26, 2007). The Act creates a technical trust that exists upon the sale of the lottery tickets and the receipt of the funds collected. The Act specifically sets forth the duties imposed upon the lottery retailer such that the trust relationship is expressly and clearly stated. Finally, the trust has a “separately identifiable res” that consists of the funds that the Act requires the lottery retailer to deposit into a segregated account. Nonetheless, if the Defendants were not operating in a fiduciary capacity with regard to the lottery proceeds under the Act, the debt resulting from their failure to turn over the proceeds cannot be nondischargeable under section 523(a)(4).

Pursuant to the Act, it is the "lottery retailer and officers of a lottery retailer's business" who have the fiduciary duty to preserve and account for lottery proceeds. O.C.G.A. § 50-27-21(a). The Defendants assert that they were neither retailers nor officers of a retailer's business. If this is the case, the Defendants would not have had a fiduciary duty to maintain the proceeds. To be entitled to summary judgment, the Plaintiff must

establish that the Defendants were either "retailers" within the meaning of the Act, or that the Defendants were officers of a "lottery retailer's business."

Under the Act, a "retailer" is defined as "a person who sells lottery tickets or shares on behalf of the corporation³ pursuant to a contract." *See* O.C.G.A. § 50-27-3(18). Accordingly, the Defendants argue that TNCC was not a "retailer" because it did not sell lottery tickets "pursuant to a contract," and, as they were never officers of any corporation other than TNCC, they could not have been officers of a retailer's business. In its earlier order, the Court noted that the parties disagree over whether the signatory to the Contract was Cadie's Corner, Inc., TNCC, or Mr. Ingram d/b/a Cadie's Corner.

It is clear from the evidence submitted that Cadie's Corner, Inc. did not execute the Contract, as Mr. Ingram was not an officer of Cadie's Corner, Inc. and had no authority to act as agent for Cadie's Corner, Inc. It is also clear that TNCC did not execute the Contract, as TNCC did not exist at the time Mr. Ingram signed the Contract. *See Wells v. J.A. Fay & Egan Co.*, 143 Ga. 732, 85 S.E 873 (Ga. 1915); Restatement 3d Agency § 6.04, Comment c ("If a promoter enters into a contract with a third party on behalf of an entity that has not yet commenced legal existence, the entity itself cannot be a party to the contract prior its existence."). The evidence is also clear that Mr. Ingram did not intend to sign the Contract on his own behalf. *See* Audie Ingram Affidavit; Response to Admissions, ¶ 1 (Mr. Ingram

³ The "corporation" is defined as the Georgia Lottery Corporation. *See* O.C.G.A. § 50-27-3(6).

signed the Contract "as Agent for [a] Corporation.").

Accordingly, the only remaining possibility is that Mr. Ingram intended to contract with the Plaintiff on behalf of TNCC, a corporation that he either believed had been established or that he intended to be established. This result is consistent with the evidence in the case, including Mr. Ingram's affidavit declaration that he signed the Contract on behalf of a corporation, along with the fact that the application completed by Mr. Ingram listed the name of the entity seeking to become a "retailer" as TNCC. It is possible that Mr. Ingram was personally liable for the obligations imposed by the Contract. *See* O.C.G.A. § 14-2-204. Under Georgia law, however, the Court would not be able to determine that Mr. Ingram is personally liable for the Contract without evidence that, at the time he signed the Contract, he knew that TNCC had not yet been incorporated. *See id.*; *see also Weir v. Kirby Construction, Inc.*, 213 Ga. App. 832, 446 S.E.2d 186 (Ga. App. 1994).

That being said, the Court need not determine that Mr. Ingram was personally liable on the Contract because the Court finds that both of the Debtors were officers of a "retailer" within the meaning of the Act. The fact that TNCC had no legal existence at the time Mr. Ingram signed the Contract does not preclude a finding that TNCC was a "retailer" that sold lottery tickets pursuant to the Contract, since TNCC adopted the Contract after its incorporation. *See Jackson v. Southern Pan and Shoring Co.*, 258 Ga. 401, 369 S.E.2d 239 (Ga. 1998); *see also* Restatement 3d Agency § 4.04, Comment c ("A corporation may adopt a contract made by a promoter by accepting its benefits with knowledge of its terms.").

Under Georgia law, "a contract made by the promoters of a corporation on its behalf may be adopted, accepted or ratified by the corporation when it is organized: the corporation then becomes liable for the contract itself, and not merely for the benefits received." *See Jackson v. Southern Pan and Shoring Co.*, 258 Ga. 401, 369 S.E2d 239 (Ga. 1998). Adoption of the contract results when the corporation "accepts the benefits of the contract." *Id.*

In this case, it is undisputed that, following its incorporation, TNCC sold Georgia Lottery tickets at the Cadie's Corner store location and complied with the obligations imposed on it as a lottery retailer. TNCC would not have been entitled to sell Georgia Lottery tickets other than under the Contract. *See* O.C.G.A. § 50-27-23(a). ("No person other than the duly certified lottery retailer shall sell lottery tickets . . ."). For these reasons, the Court concludes that TNCC adopted the Contract. Because TNCC adopted the Contract and sold tickets under the Contract, TNCC was a "lottery retailer" within the meaning of the Act. As it is undisputed that the Defendants were officers of TNCC, they owed a fiduciary duty to the Plaintiff with regard to the lottery ticket proceeds.⁴

⁴ The Defendants argue that it was not possible for TNCC to adopt the Contract because, pursuant to the Act, lottery retailer contracts are not transferrable or assignable. *See* O.C.G.A. § 50-27-18. The Court is of the opinion that the adoption of a pre-incorporation contract is not the equivalent of an assignment or a transfer and would not be prohibited by section 50-27-18. This is the case because a pre-incorporation contract is made by the promoter for the benefit of the corporation to be formed and, once the corporation has been formed and receives the benefits of the contract, the contract is adopted, and the corporation obtains all of the rights and obligations of the contract, without the need for any action by the promoter. An assignment, on the other hand, would require the promoter to affirmatively assign its interest in the contract to the corporation.

Having concluded that both Defendants acted in a fiduciary capacity with regard to the Plaintiff and that each had a duty to hold the lottery proceeds in trust for the Plaintiff, the Court may not grant summary judgment to the Plaintiff without first determining that the Defendants committed fraud or a defalcation. The Plaintiff has not alleged that the Defendants' failure to remit all of the lottery proceeds was the result of fraud. Instead, the Plaintiff submits that the Defendants caused TNCC to activate and sell lottery tickets, were responsible for depositing the funds from those sales into a segregated account maintained by TNCC for the purpose of remitting lottery proceeds to the Plaintiff, and failed to do so. This failure, the Plaintiff asserts, is sufficient to support a finding that the Defendants committed a defalcation within the meaning of section 523(a)(4).

The Defendants argue that the Court should not make a finding of defalcation in this case because they have no knowledge of why the lottery funds were not remitted to the Plaintiff. They claim that all funds derived from the sale of lottery tickets were deposited into the segregated account. Accordingly, they contend that they did not use lottery ticket proceeds for their own benefit or for any other purpose; and, therefore, have committed no defalcation. Additionally, Mrs. Ingram relies on the fact that she was not actively engaged in the operation of TNCC, did not understand her role as secretary of TNCC, and had neither the authorization nor the access required to divert the lottery proceeds to any other purpose.

In the Eleventh Circuit, the term “defalcation refers to a failure to produce funds entrusted to a fiduciary.” *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993). In *Quaif*, the

debtor was an insurance agent, who received funds for the payment of insurance premiums. By statute, the debtor was required to hold the premiums in trust for the benefit of the insurance company. The debtor failed to remit the premiums to the insurance company and instead used the funds for operating and payroll expenses. The court recognized that, although a defalcation may not result from a purely innocent mistake that results in a fiduciary's inability to produce entrusted funds, "a 'defalcation' for purposes of [section 523(a)(4)] does not have to rise to the level of 'fraud,' 'embezzlement,' or even 'misappropriation.'" *Id.* at 955. The court concluded that the debtor's use of the trust funds for payment of operating expenses was not due to mistake or negligence, but was instead intentional. Accordingly, the debtor's inability to remit the trust funds to the insurance company constituted a defalcation within the meaning of section 523(a)(4).

In accordance with the holding in *Quaif*, this Court concludes that a defalcation has occurred if a debtor, who has a fiduciary duty to segregate and remit lottery ticket proceeds, fails to do so, regardless of whether the debtor misappropriated the funds for his own use or otherwise personally benefitted from the funds. *See also In re Thompson*, 296 B.R. 563 (Bankr. M.D. Ga. 2003) ("[D]efalcation refers to a failure to produce funds entrusted to a fiduciary, even though the failure may not arise to the level of fraud, embezzlement, or even misappropriation."); *In re Daniel*, 225 B.R. 249 (Bankr. N.D. Ga. 1998) (Murphy, J.) (failure to deposit sufficient funds into segregated account and to remit funds to Georgia Lottery Corporation constituted a defalcation); *In re Barnes*, 377 B.R. 289, 297-98 (Bankr.

D. Colo. 2007) ("A defalcation committed in the course of a fiduciary relationship does not require any deliberate wrong-doing or element of intent or bad faith. Negligence or the failure of a fiduciary to account for money or property entrusted to him is sufficient to establish a defalcation."); *In re Warren*, 2007 WL 1747028 (Bankr. W.D. La. Jun. 15, 2007) ("That standard for defalcation being 'recklessness,'" it may even include an innocent default, thus encompassing an innocent fiduciary who was short in his or her account."). Additionally, the fact that the debtor is not actively engaged in the day-to-day operations of the business and is not the person who collects and deposits the lottery proceeds does not mean that the debtor has no responsibility to account for the proceeds. *In re Finley*, Case No. 07-75294-ADK (Bankr. N.D. Ga. 1997) (Kahn, J.) (debtor, as officer of lottery retailer, committed defalcation by failing to ensure that lottery retailer segregated and remitted lottery ticket proceeds, notwithstanding the fact that the debtor did not participate in the day-to-day operations of the lottery retailer and did not handle the funds or personally benefit from the funds not remitted). The officer of a lottery retailer has the obligation to "exercise ordinary care and prudence in the administration of the corporation's affairs," and this standard is not met by merely acting as a "figurehead." *Id.*

In this case, the Defendants have stipulated in their response to the Plaintiff's statement of uncontested facts that: 1) lottery tickets were activated and sold at Cadie's Corner; 2) officers of TNCC failed to deposit sufficient funds in the segregated account maintained by TNCC for such purposes; and 3) they have no reason to oppose the Plaintiff's

calculation of the amount by which that segregated account was short of the funds that should have been deposited based upon the number of tickets activated and sold at Cadie's Corner. Nonetheless, in his affidavit, Mr. Ingram testified that he deposited all of the proceeds from the sale of lottery tickets into the segregated account and that he regularly came up short and had to supplement the funds in the segregated account with funds from TNCC's general operating account.

Given the evidence in the record, the Court finds that there is no genuine factual dispute with regard to whether the Defendants committed a defalcation. The Defendants both had the obligation to account for and produce either the full amount the funds derived from the sale of lottery tickets or the unsold tickets. The fact that Mrs. Ingram had no active role in the operation of TNCC does not change this fact.

In his deposition, Mr. Ingram testified regarding his belief that the discrepancy between the amount due to the Plaintiff and the amount deposited into the lottery account may have resulted, in part, from the fact that tickets were activated, but never sold or deleted and credited by the Plaintiff. Even assuming that the failure to sell activated tickets did in fact cause a portion of the shortfall in the lottery proceeds, the Debtors' statutory fiduciary obligation extended to the unsold tickets, as well as to their proceeds. *See* O.C.G.A. § 50-27-21(a) ("Proceeds shall include unsold instant tickets received by a lottery retailer and cash proceeds of the sale of any lottery products, net of allowable sales commissions and credit for lottery prizes sold to or paid to winners by lottery retailers."). Accordingly, the

Defendants were obligated to remit to the Plaintiff either the proceeds or the unsold tickets.

The Defendants were able to provide no other explanation for a short fall between the amount of the tickets sold or returned to the Plaintiff and the amount of the proceeds deposited into the segregated account. While a theft of tickets or their proceeds by an employee or other party might preclude a finding that the Defendants committed a defalcation, assuming the Defendants employed reasonable internal controls to avoid such a theft, there is no evidence in the record to support the factual finding that any lottery tickets or proceeds were stolen or misappropriated. To the contrary, in his deposition, Mr. Ingram testified that he did not believe that any of his employees had stolen lottery tickets or proceeds.

Based on the Defendant's admissions and responses to the Plaintiff's statements of undisputed facts and Mr. Ingram's deposition testimony, the Court can only conclude that the Defendants did commit a defalcation with regard to the lottery proceeds and unsold tickets. As the party opposing a motion for summary judgment, the Defendants have the burden of pointing to evidence in the record that would create a material question of fact. They have failed to point to any evidence, and the Court can locate only Mr. Ingram's statement that he regularly came up short of the amount needed to make the deposit into the segregated account and had to resort to using general operating funds. This statement does not shed any light on the question of why the lottery proceeds were not sufficient to meet TNCC's obligation to deposit the proceeds into the segregated account, and it is insufficient

to create a genuine factual dispute that would require a trial to resolve.

As to the actual amount of the Plaintiff's damages arising from the defalcation, it would appear to the Court from the business records submitted by the Plaintiff, the affidavit of Cameron Padgett, and the deposition testimony of Mr. Ingram regarding the payments made on the account, that the amount of the debt caused by the Defendants' defalcation, less payments made on the debt following the termination of the Contract, is the \$20,476.96 sought by the Plaintiff. The Defendants have submitted no evidence that would call into question the initial unpaid balance or the amount of the payments credited by the Plaintiff to the account after the termination of the Contract.⁵

The Plaintiff has succeeded in establishing that the Defendants had a fiduciary duty to hold lottery tickets and their proceeds in trust, that the Defendants committed a defalcation with regard to the tickets and their proceeds, and that the defalcation resulted in a loss to the Plaintiff in the amount of \$20,476.96. The Defendants have presented no evidence that would create a material question of fact with regard to these conclusions. For this reason, summary judgment in favor of the Plaintiff is appropriate.

⁵ In fact, in response to the Plaintiff's counsel's question as to what Mr. Ingram believed to be the proper amount owed to the Plaintiff, Mr. Ingram replied that he would only be guessing and that he did not know. Audie Ingram Deposition, at 77. Mere speculation that the amount may not be inaccurate is insufficient to counter the evidence submitted by the Plaintiff.

CONCLUSION

Having found that the Plaintiff has satisfied the requirements of section 523(a)(4), the Court finds that the debt in the amount of \$20,476.96 owed by the Defendants, Audie Elmo Ingram and Deborah Lynn Ingram, is nondischargeable. A separate judgment in favor of the Plaintiff shall be entered.

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